No. 06-736

In The Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

STATE OF NEW YORK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF VIRGINIA, ALABAMA, ALASKA, ARKANSAS, KANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, AND WYOMING AS RESPONDENTS IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the court of appeals erred in invalidating an EPA rule on the ground that the phrase "any physical change" in the definition of "modification" in Section 111(a)(4) of the Clean Air Act, 42 U.S.C. § 7411(a)(4), unambiguously requires EPA to adopt the broadest meaning of the phrase?

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BRIEF OF VIRGINIA, ALABAMA, ALASKA, ARKANSAS, KANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, AND WYOMING AS RESPONDENTS IN SUPPORT OF THE PETITION

Virginia, Alabama, Alaska, Arkansas, Kansas, Missouri, Nebraska, North Dakota, South Dakota, Utah, and Wyoming (collectively "Intervening States") were parties in the court of appeals and, thus, technically are Respondents in this Court. *See* Sup. Ct. R. 12.6 ("All parties other than the petitioner are considered respondents. . . . "). The Intervening States entered this litigation to support the United States Environmental Protection Agency ("EPA") and they continue to believe EPA's position is correct. Therefore, the Intervening States ask this Court to grant the Petition for the reasons stated in EPA's Petition for Certiorari. *See* Sup. Ct. R. 12.6 ("a response supporting the petition shall be filed within 20 days after the case is placed on the docket").

In the event this Court grants certiorari, the Intervening States will file a Brief on the Merits as Respondents supporting the Petitioner. *See* Sup. Ct. R. 25.1 ("Any respondent . . . who supports the petitioner . . . shall meet the petitioner's . . . time schedule for filing documents.").

STATEMENT

As explained in more detail in the Petition, this matter involves a challenge by New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Vermont, Wisconsin, and the

District of Columbia as well as various local governments and private entities (collectively "New York") to the Environmental Protection Agency's regulations for determining when the Clean Air Act's New Source Review provisions apply. Specifically, New York contends that 40 C.F.R. §§ 52.21(b)(2)(iii)(a) and 52.21(cc) which is the Equipment Replacement Provision of the Routine Maintenance, Repair, and Replacement Exclusion ("the Rule"), is invalid.

The Clean Air Act, 42 U.S.C. §§ 7401 through 7671q, provides for a pre-construction permitting program referred to as New Source Review. *See* 42 U.S.C. §§ 7475 and 7503. The New Source Review program applies in areas where air quality does not meet the National Ambient Air Quality Standard promulgated by EPA for a specified air pollutant and in areas that do meet the National Ambient Air Quality Standard or are unclassifiable. *Id.*

Activities at existing stationary sources for which a "pre-construction" permit may be required are those that constitute a "modification" of the source.[1] Routine maintenance, repair, and replacement have been excluded from New Source Review requirements since the program's inception. In the challenged Rule, EPA provided a category

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[1] For New Source Review purposes, as provided by 42 U.S.C. § 7479(2)(C) and 42 U.S.C. § 7501(4), the term "modification" is defined as:

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4).

of equipment replacement activities that are not subject to major New Source Review requirements under the routine maintenance, repair, and replacement exclusion. Environmental Protection Agency, *Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR); Equipment Replacement Provision of the Routine Maintenance Repair and Replacement Exclusion*, 68 Fed. Reg. 61248, 61248-49 (Oct. 27, 2003). As provided in the challenged Rule, replacement of broken or deteriorating equipment at a stationary source is *not* a modification of that source *if*: (1) the replacement equipment is identical or functionally equivalent to the equipment being replaced; (2) the source's basic design does not change; and (3) it does not cause emissions in excess of any Clean Air Act emission limitation to which the source is subject. Even if the project meets all of these criteria, however, the permitting authority must still review the project as a potential modification *if* the project is very expensive (i.e., if the cost of the replacement equipment exceeds twenty percent of the cost of a comparable new process unit). 40 C.F.R. § 52.21(cc).

In the court below, the Intervening States argued that the Rule serves two important purposes. First, the Rule provides a much-needed clarification of the meaning of the terms "modification" and "physical change" in the Equipment Replacement Provision of the Routine Maintenance, Repair, and Replacement Exclusion in the New Source Review Program. The bright-line threshold established by the Rule will give States and regulated entities the regulatory certainty needed to make rational choices about environmental and energy impacts. *See Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005) ("[T]he first virtue of any jurisdictional rule is clarity and ease of

implementation."). Second, the Rule removes any incentive for the owners and operators of generating facilities to delay the routine replacement of equipment. Although making such replacements improves the reliability, efficiency, and safety of generating facilities, owners and operators frequently delay such replacement because they fear that the New Source Review requirements will apply. *See* Environmental Protection Agency, *New Source Review: Report to the President* 30-31 (2002). The Rule ensures that replacement decisions are based on reliability, efficiency, and safety considerations.

Ultimately, the District of Columbia Circuit found that the Rule was invalid, finding it "contrary to the plain language of" the definition of "modification" in the Clean Air Act. The court of appeals emphasized that the statutory definition of modification uses the term "*any* physical change," 42 U.S.C. § 7411(a)(4) (emphasis added). "[W]hen Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings. . . . " *New York v. EPA*, 443 F.3d 880, 888 (D.C. Cir. 2006). Thus, "[a]lthough the phrase 'physical change' is susceptible to multiple meanings, the word 'any' makes clear that activities within each of common meanings of the phrase are subject to [New Source Review] when the activity results in emission increase." *Id.* at 890. Moreover, the District of Columbia Circuit found that the EPA interpretation was contrary to history and the structure of the Act. *Id.* Subsequently, the court of appeals denied rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the legal effect of the lower court's ruling is far reaching. The court of appeals effectively held that when Congress uses the word "any" in a statute to modify an ambiguous term, an agency's discretion to construe statutory terms is eliminated. The agency must adopt the broadest possible interpretation of a phrase that is otherwise ambiguous. Such a result contradicts the principle that a statutory term must be construed in context, rather than isolation. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Indeed, this Court repeatedly has recognized that, in some contexts, the word "any" can have something less than the broadest possible meaning. *See Small v. United States*, 544 U.S. 385, 388 (2005); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004); *Middlesex County Sewage Auth. v. National Sea Clammer's Ass'n*, 453 U.S. 1, 15 (1981). Thus, it is possible that "any physical modification" means something less than all conceivable physical modifications. Moreover, by requiring the broadest possible construction whenever the term "any" is used with an admittedly ambiguous term, the lower court contradicted the principles of *Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Second, the practical effect of the District of Columbia Circuit ruling is to invalidate a significant EPA regulatory initiative that was quite important to utilities with coal burning power plants and to States that have such plants and/or produce significant amounts of coal. Prior to the EPA's attempt to promulgate the Rule, application of the routine maintenance exclusion depended upon a multi-factor case-by-case determination that was uncertain and inconsistent. The new Rule was an attempt to establish a

bright-line standard that would result in certainty and consistency.

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED.**

Respectfully submitted,

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